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this Memorandum Decision shall not be
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establishing the defense of res judicata,
collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY BLANCO,)	
)	
Appellant,)	
)	
vs.)	No. 20A04-0610-CR-566
)	
STATE OF INDIANA,)	
)	
Appellee.)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Stephen E. Platt, Judge
Cause No. 20D02-0605-FB-86

March 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Anthony Blanco appeals his conviction for Aggravated Battery, as a Class B felony, following a jury trial. He presents a single issue for our review, but, as the State points out in its cross-appeal, we are without jurisdiction to consider Blanco's appeal.

We dismiss.

FACTS AND PROCEDURAL HISTORY

Following a jury trial, Blanco was convicted of aggravated battery, and the trial court sentenced him to fifteen years, with nine years suspended. At the conclusion of sentencing on October 18, 2004, the following colloquy occurred:

Court: Okay, since you were convicted at a trial by jury, you're entitled to take an appeal or file a Motion to Correct Error as of today's date. If you wish to, you must file a Notice of Appeal or Motion to Correct Error within thirty days of today's date. I'm going to assume that you wish to do so. I'm going to appoint Eric Kinsman as appellate counsel to represent you. Mr. Kinsman's in open court today. Mr. Kinsman will initiate the Notice of Appeal within thirty days of today's date. You have any questions about that?

Blanco: No.

Court: Okay. Copy to counsel and to Kinsman. Good luck to you.

Transcript at 212. Blanco did not file a notice of appeal within thirty days.

On May 4, 2006, Blanco's appointed appellate counsel, Kinsman, filed a Petition for Permission to File a Belated Notice of Appeal. In that unverified petition, Kinsman states in relevant part: that the appointment order was mailed to the public defender's office instead of his private office; that Blanco was not at fault in failing to timely file a notice of appeal; and that Blanco "has been diligent in requesting permission to file a

belated notice of appeal.” Appellant’s App. at 44. Blanco did not submit any evidence in support of his petition, and the trial court granted the petition without a hearing. This belated appeal ensued.

DISCUSSION AND DECISION

Generally, the trial court has discretion in reviewing a petition for permission to file a belated notice of appeal and its decision will not be disturbed unless an abuse of discretion is shown. Townsend v. State, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), trans. denied. However, when the allegations contained in the motion itself provide the only basis in support of a motion, we review the decision de novo. Id.

In Townsend, we observed:

Because Townsend failed to file a timely notice of appeal, he was required to challenge his conviction through the Post-Conviction Rules. If a defendant fails to file a Notice of Appeal within thirty days as required, the right to appeal is forfeited unless sought under P-C.R. 2. Ind. Appellate Rule 9(A)(5). Townsend petitioned for permission to file a belated notice of appeal under Ind. P-C.R. 2(1), which provides in part:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

(a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

(b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

The trial court shall consider the above factors in ruling on the petition. . . . If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period.

(Emphasis supplied).

A petitioner has the burden of proving by a preponderance of the evidence that he is entitled to the relief sought. Therefore, in a proper motion for a belated notice of appeal, he must demonstrate he was diligent in pursuing the appeal.

* * *

Without any evidence regarding the two elements of P-C.R. 2(1), a petitioner cannot have met his burden of proof.

843 N.E.2d at 974-75 (citations and footnote omitted).

Here, Blanco did not submit any evidence to support his counsel's allegations that Blanco was without fault in not timely filing a notice of appeal and that he was diligent in requesting permission to file a belated notice of appeal. Nor is there any evidence to support his counsel's allegation that "the appointment order was directed at [sic] the public defender's office and not to Mr. Kinsman's private office." Appellant's App. at 44. As such, Blanco has not met his burden of proof. See Townsend, 843 N.E.2d at 975. Under our de novo review, we hold that the trial court erred when it granted Blanco's petition, and we dismiss his appeal for lack of jurisdiction. See id.

Dismissed.

MAY, J., and MATHIAS, J., concur.